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ABSTRACT

To provide information about legal decisions on home-based private education programs, court cases decided since 1980 and the courts' analyses of constitutional issues raised during litigation are summarized. The memorandum discusses cases that involved challenges to the constitutionality of state home schooling regulations and are based on: (1) the free exercise of religion and right to direct a child's education; (2) the right to equal protection of the law for home schooling and private schools under the 14th Amendment; (3) the right to an impartial decision maker in deciding home-schooling program validity; (4) the prohibition against the establishment of religion under the First Amendment; (5) the privilege against self-incrimination under the Fifth Amendment; (6) the prohibition against unreasonable searches imposed by state regulations; and (7) due process rights related to vagueness of language and improper delegation of authority in the regulations. Four appendices provide more detailed information about individual cases and then summarize them to discuss their constitutionality in terms of home-schooling program approval, instructor qualifications, standardized testing, on-site inspections, and decisionmakers. (EJS)

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INFORMATION MEMORANDUM 90-23

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November 21, 1990

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RECENT COURT CASES EXAMINING THE CONSTITUTIONALITY OF OTHER STATES' LAWS REGULATING HOME SCHOOLS

* *

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INTRODUCTION

This Information Memorandum was prepared for the Legislative Council's Special Committee on Home-Based Private Educational Programs. It summarizes reported court cases, decided since 1980, which examined the validity, under various provisions of the U.S. Constitution, of regulations and related enforcement procedures applicable to home schools under other states' laws.

The body of this Memorandum discusses the courts' analyses of the major constitutional issues raised in the cases and is organized by constitutional issue.

To provide more detailed information about individual cases, appendices are included, each of which summarizes individual cases discussing the constitutionality of a particular type of regulation or related enforcement procedure.

In reviewing this Memorandum, it should be noted that:

1. The U.S. Supreme Court has not yet decided any cases directly involving state regulation of home schools. Thus, all of the cases discussed in this Memorandum were decided by lower courts, specifically federal district courts, federal courts of appeals and state appeals courts, including state supreme courts.

2. Because there is no general reporting system for state trial court decisions (as opposed to state appeals court decisions), state trial court decisions are not included in this Memorandum. Federal trial court

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decisions (i.e., decisions of federal district courts) are included since there is a reporting system for them.

3. Where a court decision on the merits of a constitutional issue relating to a home school regulation has been reviewed by a higher court on appeal, the lower court's decision in the case is not discussed.

4. Only majority opinions are discussed in this Memorandum; dissenting opinions are not summarized.

5. Some of the laws examined by the courts in the cases described in this Memorandum have been amended since the case was decided. [For descriptions of current state statutes regarding home-schooling, see MEMO NO. 3, Examples of Home Schooling Provisions in Other States' Laws Relating to Reporting and Recordkeeping, Student Performance Assessment, Instructor Competency and Program Approval, dated October 12, 1990.]

This Memorandum is intended to be a thorough discussion of recent (1980 and after) reported case law on the topics taken up. The reader will note that the trend of the cases discussed in this Memorandum is to uphold the constitutionality of state laws regulating home schools. Because of the pronounced nature of this trend, special care was taken to attempt to find reported cases striking down state regulations. With the limited exception of cases which found regulations to be unconstitutionally vague, that effort was unsuccessful, which tends to indicate that there are few, if any, such cases.

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DISCUSSION OF CONSTITUTIONAL ISSUES

This Memorandum discusses cases which involved challenges based on:

1. The right to free exercise of religion under the First Amendment to the U.S. Constitution; and the right of parents to direct the upbringing and education of their children, based primarily on privacy and liberty interests under the 14th Amendment.

2. The right to equal protection of the laws under the 14th Amendment.

3. The right to an impartial decision-maker under the Due Process Clause of the 14th Amendment.

4. The prohibition against the establishment of religion by Congress or the states under the First Amendment.

5. The privilege against self-incrimination under the 5th Amendment.

6. The prohibition against unreasonable searches under the 4th Amendment.

7. Due process rights under the 14th Amendment relating to the "void for vagueness" doctrine and improper delegation of authority.

In two of the cases discussed in this Memorandum, the courts held that requirements relating to instructor qualifications were unconstitutionally vague because they failed to provide adequate standards by which persons attempting to comply with or enforce the laws could know whether a violation had occurred. In all the remaining cases, the courts upheld the laws.

In these cases, different courts sometimes applied different standards to analyze the same constitutional issue or emphasized different factors. These differences reflected, in part, the factual situations before the courts, but they also reflected some inconsistencies in the legal analyses used by the courts.

This Memorandum discusses, for each of the major constitutional issues raised in the cases summarized, the standards and reasoning used by the courts in analyzing that issue and the factors that the courts emphasized in reaching their conclusions.

See the appendices to this Memorandum for more detailed descriptions of the individual cases.

I. FREE EXERCISE OF RELIGION AND RIGHT TO DIRECT CHILD'S EDUCATION

Two of the major claims made in cases which challenge the validity of specific home school regulations are that the regulation infringes upon: (a) the Free Exercise of Religion Clause of the First Amendment to the U.S. Constitution; or (b) parents' liberty or privacy rights, based primarily on the 14th Amendment, to direct the upbringing and education of their children.

The 1972 decision, Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972), is the most recent U.S. Supreme Court case to directly review a conflict between parental interests and compulsory attendance laws. In that case, the Court balanced the parents' First Amendment right to free exercise of religion with the state's interest in ensuring the education of all children.

Since Wisconsin v. Yoder, the U.S. Supreme Court has changed the general framework of analysis of First and 14th Amendment cases from a balancing of rights or interests to a "strict scrutiny" analysis. Under the strict scrutiny analysis, the burden is on the person raising the constitutional challenge to a government regulation to initially demonstrate both of the following:

a. That the person's interest is fundamental. [In the case of a claim that a regulation violates the Free Exercise of Religion Clause of the First Amendment, a sincerely-held religious belief must be shown.]

b. That the challenged regulation burdens the fundamental interest.

If the challenger meets the above requirements, the state can prevail only if both of the following are found:

c. That the challenged regulation is motivated by a compelling state interest.

d. That the state's actions are the least-restrictive means to achieving the compelling state interest. [See the discussion in Rose, Daniel J., "Compulsory Education and Parent Rights: A Judicial Framework of Analysis," Boston College Law Review, Vol. 30-861 (May 1989).]

In cases where no constitutionally protected fundamental right is involved, or there is no burden on such a right, rather than applying the strict scrutiny analysis, the courts look to whether the state regulation is "reasonable." This difference in the analytical standard can be crucial in determining the outcome of a case: it is more difficult for a state regulation to be overturned under a "reasonableness" analysis than under a strict scrutiny analysis.

A. Free Exercise of Religion

Although the U.S. Supreme Court has not yet had the opportunity to apply its strict scrutiny analysis to compulsory school attendance cases, courts throughout the country have applied that analysis to home school cases involving free exercise of religion claims. However, not all courts have used this analysis and, where used, its application has not been uniform.

For example, in Jernigan v. State, 412 So. 2d 1242 (C.C.A. Ala. 1982), the Court of Criminal Appeals of Alabama did not use the strict scrutiny analysis in reviewing that state's home school teacher certification requirement. Instead, citing the U.S. Supreme Court's decision in Wisconsin v. Yoder, the Court balanced the interests of the state against the religious interests asserted by the parents [Jernigan v. State is summarized in Part C of Appendix II to this Memorandum].

Also, in a series of cases relating to the application of North Dakota's teacher certification requirement to home schools, the North Dakota Supreme Court set forth the applicable analysis as a three-part test, rather than the four-part strict scrutiny analysis summarized above. The Court replaced the third and fourth elements, as described above, with an analysis that appeared to have elements of the balancing test used in Wisconsin v. Yoder. However, in applying its test, the North Dakota Supreme Court indicated that the state must bear the burden of demonstrating the unavailability of less restrictive means of achieving its aims. [See State v. Patzner, 382 N.W. 2d 631 (N.D. 1986), and the following cases summarized in Part B of Appendix II.]

Notwithstanding the variations just described in most of the recent home school cases which involved free exercise of religion claims, the courts applied the strict scrutiny analysis. In these cases, the parties stipulated or the courts, without lengthy discussion, recognized the involvement of a fundamental interest--a sincerely-held religious belief. Also, in most of these cases, the courts found at least some burden on the free exercise of religion. [However, see Blackwelder v. Safnauer, 189 F. Supp. 106 (N.D.N.Y. 1988), summarized in Part A of Appendix I; State v. Schmidt, 505 N.E. 2d 627 (Ohio 1987), cert. den., 484 U.S. 942, 108 S. Ct. 327, summarized in Part D of Appendix I; and People v. De Jonge, 179 Mich. App. 225, 449 N.W. 2d 899 (1989), summarized in Part A, 2, of Appendix II.]

Most of the courts' discussion of free exercise of religion claims dealt with the last two parts of the strict scrutiny analysis: (1) whether the challenged regulation was motivated by a compelling state interest; and (2) whether the state's actions were the least-restrictive means to achieving the compelling state interest.

Generally, in these cases, the courts had little difficulty finding a compelling state interest. Factors stressed by the courts included that education is perhaps the most important function of state and local governments; an educated citizenry is vital to the preservation of a democratic system of government; and education provides the basic tools by which individuals might lead economically productive lives. Other factors mentioned by individual courts included the following:

1. When a child lacking the maturity and experience to make an independent judgment concerning the course of his or her educational future is denied the paramount privilege of an education which meets basic minimum standards, a compelling state interest is implicated [Blackwelder v. Safnauer, supra, summarized in Part A of Appendix I].

2. The state's interest is not simply an interest in education but an interest in the quality of education [Blount v. Department of Educational and Cultural Services, 551 A. 2d 1377 (Maine 1988), summarized in Part B, 2, of Appendix I].

3. It would eviscerate the state's interest in education to restrict the state to assuring the mere physical presence of school children in some facility purporting to be a classroom [Blount v. Department of Educational and Cultural Services, supra, summarized in Part B, 2, of Appendix I].

In examining the state's interest (as well as the burden on the parents' religious beliefs), many of the courts distinguished the home schoolers' religious beliefs from the religious beliefs of the Amish involved in Wisconsin v. Yoder. For example, in Jernigan v. State, supra, summarized in Part C of Appendix II, the Court of Criminal Appeals of Alabama noted that the Amish parents in Wisconsin v. Yoder did not object to elementary education through the first eight grades, while the parents in Jernigan v. State sought to exempt their children from all public education without any showing that the home education they practiced was an adequate substitute or replacement. Also, according to the Alabama Court, unlike the Amish, the parents had not demonstrated that their home teachings were successful in preparing their children for life; that their entire way of life was inextricable from their religious beliefs; or that public schooling would substantially interfere with their religious practices.

Courts made the following general comments regarding the fourth step of the strict scrutiny analysis--that the state's actions are the least-restrictive means to achieving the compelling state interest:

1. Despite its categorical phrasing, the "least-restrictive means" analysis amounts to a balancing test: the state must prove that all less restrictive means advanced by the plaintiffs would cause too much harm to the public interest in educational quality to justify the increased burden

to the plaintiffs' exercise of religion. The state need not meet the impossible burden of proving that no adequate less restrictive alternative can be developed; it need only show that none has been proposed [Blount v. Department of Educational and Cultural Services, supra, summarized in Part B, 2, of Appendix I].

2. The imposition of less restrictive home schooling regulations by one or more other states does not demonstrate that a particular state's law is not the least-restrictive means of fulfilling that state's compelling interest in educational quality. Other state's choices are entitled to no more deference than are any other proposed regulatory alternatives. [See Blount v. Department of Educational and Cultural Services, supra, summarized in Part B, 2, of Appendix I. Also, see People v. De Jonge, supra, summarized in Part A, 2, of Appendix II; and State v. Patzner, 382 N.W. 2d 631 (N.D. 1986), cert. den., 469 U.S. 825, 107 S. Ct. 99 (1988), summarized in Part B, 1, of Appendix II.]

3. A state must have a mechanism by which it can confidently and objectively be assured that its citizens are being adequately educated. [See Murphy v. Arkansas, 852 Fed. 2d 1039 (8th Cir. 1988), summarized in Appendix III.]

Applying the "least-restrictive" analysis to specific types of home school regulations, courts made the following comments regarding those regulations and alternatives to them:

1. The Maine Supreme Court said that the less restrictive alternative that the plaintiffs offered to Maine's teacher certification requirement as the most promising was standardized testing. However, the plaintiffs were only willing to submit test scores if the scores were not used as part of an approval process. According to the Court, it strained the imagination to envision how testing could function as a substitute for state approval, rather than as a mechanism for approval [Blount v. Department of Educational and Cultural Services, supra, summarized in Part B, 2, of Appendix I].

2. The Michigan Court of Appeals held that Michigan's teacher certification requirement was the least obtrusive means of achieving the state's interest. According to the Court, the defendants implicitly argued that curriculum and attendance requirements were sufficient to protect the state's interest. The Court said that curriculum and attendance requirements ensure that the student and the educational material are in the same place at the same time, but do nothing to ensure that the material is imparted to the child in such a way as to be understandable [People v. De Jonge, supra, summarized in Part A, 2, of Appendix II].

3. In examining North Dakota's teacher certification requirement, the North Dakota Supreme Court said the alternative of standardized

testing would not reveal possible deficiencies until the end of a school term and would likely not satisfy the state's interest. Also, the Court said that having local or state officials make subjective evaluations of parents' ability or lack of ability to teach their children might very well be considered a more restrictive or intrusive measure of gauging the parents' qualifications as educators than the teacher certification requirement [State v. Patzner, supra, summarized in Part B, 1, of Appendix II].

4. Examining Arkansas' standardized testing requirement, the U.S. Court of Appeals for the 8th Circuit specifically rejected the argument that parental testing of children would provide a sufficient safeguard to assure the state's interest. Similarly, the Court said that parental affidavits concerning the children's progress would be insufficient [Murphy v. Arkansas, supra, summarized in Part A of Appendix III].

Finally, in a number of these cases, the courts specifically noted the flexibility provided to home schoolers under some of the states' laws, as support for their conclusions that the regulations being challenged were not overly restrictive. [Specifically, see Blackwelder v. Safnauer, supra, summarized in Part A of Appendix I; Blount v. Department of Educational and Cultural Services, supra, summarized in Part B, 2, of Appendix I; and Murphy v. Arkansas, supra, summarized in Appendix III.]

B. Right to Direct Child's Education

In a number of cases, claims were made that specific home school regulations violated parents' privacy and liberty interests under the Due Process Clause of the 14th Amendment. In none of these cases did the court specifically apply the strict scrutiny analysis and, in a number of the cases, the courts directly rejected the application of that analysis.

For example, in examining one such claim involving Michigan's teacher certification requirement, the Federal District Court for the Western District of Michigan, Southern Division, said that the case "stands or falls" on the plaintiffs' argument that the claimed right to control the education of their children rises to the level of a fundamental constitutional right. However, the Court said that the plaintiffs had cited no cases holding that parents have such a fundamental constitutional right. The Court said that, instead, the plaintiffs relied on dicta from several U.S. Supreme Court decisions, including Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625 (1923), Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925), and Wisconsin v. Yoder, supra. The Court also distinguished the plaintiffs' claim from the claims of the Amish in Wisconsin v. Yoder, stressing that the plaintiffs' claim was not based on religious beliefs. The Court concluded that the plaintiffs' claimed right to educate their children at home free from Michigan's teacher certification law did not rise above a "personal or philosophical choice"

and, therefore, was not within the bounds of constitutional protection. As a result, the state need not demonstrate a "compelling interest" but only that it acted "reasonably" [Hanson v. Cushman, 490 F. Supp. 109 (W.D.S.D. Mich. 1980), described in Part A, 1, of Appendix III].

The Federal District Court's analysis in Hanson v. Cushman, supra, was followed in two other cases involving the Michigan teacher certification requirement: People v. De Jonge, supra, summarized in Part A, 2, of Appendix II; and Clonlara v. Runkel, 722 F. Supp. 1442 (E.D.S.D. Mich. 1989), summarized in Part A, 3, of Appendix II. In Clonlara v. Runkel, the Court emphasized that, in Wisconsin v. Yoder, the U.S. Supreme Court characterized the parents' fundamental right involved as the right to direct their child's religious upbringing, not their child's education per se.

Also, see Murphy v. Arkansas, supra, summarized in Appendix III, in which the Court rejected the extension of the right to privacy to parental decisions concerning the direction of their child's education.

The following cases which rejected claims based on the right to direct a child's education did not clearly articulate the standard being used.

1. In State v. McDonough, 468 A. 2d 977 (Maine 1983), summarized in Part B of Appendix I, the Supreme Judicial Court of Maine did not apply the strict scrutiny analysis. Instead, citing Wisconsin v. Yoder, the Court said that the requirement that parents seek the approval of public school authorities for home educational plans was fully justified by the state's "high responsibility" for the education of its citizens.

2. In Care and Protection of Charles and Others, 504 N.E. 2d 592 (Mass. 1987), summarized in Part C of Appendix I, the Court said that parents' liberty interests, protected by the 14th Amendment, extend to activities involving child-rearing and education and parents have a basic right to direct the education of their children. However, in upholding Massachusetts' home school approval requirement, the Court said this right is not absolute and "must be reconciled" with the substantial state interest in the education of its citizenry.

3. In Jernigan v. State, supra, summarized in Part C of Appendix II, the Alabama Court of Criminal Appeals cited the U.S. Supreme Court's opinion in Meyer v. Nebraska, supra, for the proposition that education of the young is only possible in schools conducted by specially qualified persons who devote themselves to educating the young. The Court found that statement to be equally true for children who receive their education in the home and ample justification for what it characterized as the state's "reasonably narrow requirement" of certification.

In only one of the cases discussed in this Memorandum did a court indicate that the strict scrutiny analysis should be used to evaluate claims regarding the parents' rights to direct their children's education. The Federal District Court for the Northern District of New York said that recent cases involving the constitutional right to privacy indicate that the strict scrutiny analysis should be used. However, the Court said that whatever standard was applied, the New York compulsory attendance laws survived scrutiny [Blackwelder v. Safnauer, supra, summarized in Part A of Appendix I].

In cases involving parents' rights to direct the education of their children, factors noted by the courts as supporting specific state regulations included the following:

1. For the state to allow home education without imposing some standards as to quality and duration would be, in many cases, to allow parents to deprive their children of any education whatsoever. Not all parents who would hold their children out of school under an unlimited exception to the compulsory attendance laws would have the sincere desire to provide their children with adequate instruction [State v. McDonough, supra, summarized in Part B, 1, of Appendix II].

2. Many parents, even though they have a sincere desire to educate their children at home, lack the necessary training and facilities to do so [State v. McDonough, supra, summarized in Part B, 1, of Appendix II].

3. Without an approval process, the state would be powerless to assert its interests in the education of a child who is being "otherwise instructed" (e.g., instructed at home) [Care and Protection of Charles and Others, supra, summarized in Part C of Appendix II].

Also, see the factors considered by the courts in cases involving the right to free exercise of religion, listed under Part I, above.

II. EQUAL PROTECTION

In a number of cases, parents made 14th Amendment equal protection claims. In each of these cases, the courts applied a "rational basis" test, rather than the strict scrutiny analysis which is applied to equal protection claims involving "suspect" classifications, such as race or religion.

Parents argued that states' distinctions between home schooling programs and private schools were "arbitrary" or "irrational" in Blount v. Department of Educational and Cultural Services, supra, described in Part B, 2, of Appendix I, and Murphy v. Arkansas, supra, described in Appendix III.

In Blount v. Department of Educational and Cultural Services, the Maine Supreme Court rejected the equal protection argument, noting that this claim was a "reprise" of a previously discussed argument raised by the parents under their free exercise of religion claim. The Blounts had argued that Maine's distinction between home schooling programs and private schools was arbitrary. According to the Blounts, any valid reason the state might have for supervising home schooling more closely than organized private schools could not be grounded in a public interest sufficiently compelling to allow the state to enforce the distinction against religious conscientious objectors. The Court disagreed stating that the reason the state may monitor organized schools at a distance is the presence of an active intermediary and monitor--the parents. Parents, by the nature of things, cannot give their own home schooling program the same arm's-length supervision. The Court said that since the law had already survived strict scrutiny analysis under the First Amendment free exercise of religion claim, the classification would easily pass the equal protection rational basis test.

In Murphy v. Arkansas, the U.S. Court of Appeals for the 8th Circuit said that it could be argued that the Arkansas law requiring standardized testing, while superficially neutral, had a discriminatory impact on the category of deeply religious individuals impelled by their convictions to school their children at home. However, even if such discriminatory impact was shown, it would not be sufficient to invoke strict scrutiny. The plaintiffs would still bear the burden of proving discriminatory purpose or intent and no showing had been made. The Court of Appeals also rejected the argument that strict scrutiny should be applied to the equal protection claim because a fundamental right was involved. The Court said that no persuasive arguments had been advanced that there was a fundamental right of parents to supervise their children's education to the extent the parents contended.

The Court of Appeals then said that there was a rational reason to subject home schooling to regulatory requirements, while freeing private schools from virtually any regulation. According to the Court, it could be argued that the notion of an actual, independent school, away from home, implies more formality and structure than a home school which could lead the state to believe that more serious instruction would be occurring than in the relaxed atmosphere of home; the notion that more than one family is likely to be sending their children to a private school may provide an additional objective indication of the private school's quality; and parents sending a child to a private school have to pay money for education and, therefore, would be more likely to demand their money's worth of instructional quality.

In Hanson v. Cushman, supra, summarized in Part A, 1, of Appendix II, the plaintiffs claimed an equal protection violation, arguing that Michigan's law treated parents who wished to educate their children at home differently depending upon whether or not the parents were certified

teachers. The Federal District Court said that this distinction did not have any adverse impact peculiar to a member of a constitutionally protected "suspect" class and no "fundamental" right was involved. Therefore, there need be only a "rational relationship" between the distinction being made and a legitimate state purpose. The Court found such a relationship based upon the difficulty and expense that the state would have in examining and supervising a "host of facilities and individuals, widely scattered," who might instruct their children at home without certification, as compared to the less difficult and less expensive mechanism of requiring certification.

In Clonlara v. Runkel, supra, summarized in Part A, 3, of Appendix II, the plaintiffs made an equal protection claim under 42 U.S.C. s. 1985 (3), apparently based on differential treatment of members of a class of people who wished to provide for their children's education at home. The Court held that the plaintiffs had not shown the kind of "class-based invidiously discriminatory animus" needed to sustain a claim under that statute.

III. DECISION-MAKER

In four cases discussed in this Memorandum, the courts examined home school parents' claims that their 14th Amendment due process rights were violated by the role of local public school officials in approving or making other decisions relating to home schools.

In three of these cases, the parents argued that a conflict of interest existed because the public school district received state funds based on the number of pupils enrolled in the school district [Blackwelder v. Safnauer, supra, summarized in Part A of Appendix I; State v. Anderson, supra, summarized in Part B, 2, of Appendix II; and People v. De Jonge, supra, summarized in Part A, 2, of Appendix II]. The Courts rejected each of these claims but for different reasons, as follows:

a. In Blackwelder v. Safnauer, the Federal District Court rejected the state aid argument noting that the plaintiffs failed to demonstrate that the decision-maker had a personal financial stake or official motive in the outcome of his or her decision. The Court said that even assuming that a financial incentive did exist for the school district, a school superintendent in New York is not responsible for assuring that the money necessary to run the school system is provided--school boards have that responsibility.

b. In State v. Anderson, the North Dakota Supreme Court said that if a statute is susceptible of two constructions, one of which would render it of doubtful constitutionality and one of which would not, the latter construction must be adopted. In order to remove any doubt of due process infirmities due to the state aid issue, the Court construed the law to

require the local school board to "monitor" whether or not a school-age child was attending an approved school. According to the Court, the local school board act was a ministerial function, rather than a discretionary, decision-making function.

c. In People v. De Jonge, the Michigan Court of Appeals disagreed with the defendants' interpretation of Michigan law and held that no home school approval process existed.

A different issue was addressed by the North Dakota Supreme Court in State v. Brewer, 444 N.W. 2d 923 (N.D. 1989), described in Part B, 2, of Appendix V. In that case, the defendants argued that the local public school district was the "institutional opponent" of home schoolers. The North Dakota Supreme Court declined to hold, as a matter of law, that the probability of actual bias on the part of public school officials approaches a constitutionally impermissible level. The Court also said that there was no factual evidence in the record of the case which reflected an actual bias on the part of the particular school board officials.

IV. ESTABLISHMENT OF RELIGION

Defendants claimed that home school regulations violated the Establishment Clause of the First Amendment in Blackwelder v. Safnauer, supra, described in Part A of Appendix I, and State v. Patzner, supra, described in Part B, 1, of Appendix II. The Establishment Clause prohibits Congress from enacting laws respecting the establishment of religion (i.e., the Establishment Clause requires separation of church and state) and is applied to the states by application of the 14th Amendment.

Both courts used the three-part test developed by the U.S. Supreme Court for analyzing whether a statute violates the Establishment Clause. Under this test to be valid:

a. The statute must have a secular purpose.

b. Its principal or primary effect must be one that neither advances nor inhibits religion.

c. The statute must not foster an excessive government entanglement with religion [see Lemon v. Kurtzman, 403 U.S. 601, 91 S. Ct. 2105 (1971)].

In Blackwelder v. Safnauer, the Court found that the statute served legitimate secular purposes related to the education of its citizens and accommodated religious beliefs without approaching the level where the government itself had advanced them through its own activities or influence. The Court said that the third part of the three-part test was

the most directly implicated by the plaintiffs' contentions. The plaintiffs argued that the type of educational standards contemplated by New York, particularly the insistence of local school superintendents on prearranged home visits during the instruction of children, posed a significant threat of fostering the excessive entanglement of government and religion. The Court rejected this claim, stressing that ongoing inspections were not required and that the inspections were limited in purpose.

The plaintiffs also argued that a more pervasive involvement on the part of the state might occur if a home schooling program had difficulty in obtaining the approval of local school officials. The District Court rejected this argument saying that a certain amount of contact between government and religious organizations is inevitable and that no state interference with religious training given students attending home schools was contemplated.

In State v. Anderson, the North Dakota Supreme Court described a decision of the U.S. Court of Appeals for the 8th Circuit involving the placement of state university students seeking to become licensed teachers in parochial schools to fulfill their student teaching requirements. In that case, the Court of Appeals found that the program could not help but communicate a message of government endorsement of the parochial schools and their religious messages [Stark v. St. Cloud State University, 802 F. 2d 1046 (8th Cir. 1986)]. The North Dakota Supreme Court also described a U.S. Supreme Court case involving the use of federal funds to pay salaries of public school employes who taught in parochial schools. In that case, the U.S. Supreme Court held that the supervision and administrative cooperation required permanent and pervasive state presence in the sectarian school, thus, entangling church and state [Aguilar v. Felton, 473 U.S. 402, 105 S. Ct. 3232 (1985)].

The North Dakota Supreme Court said that the North Dakota teacher certification requirement did not present the same problems, concluding that the requirement neither advanced nor inhibited religion and did not foster excessive government entanglement with religion.

V. SELF-INCRIMINATION

In State v. McDonough, supra, described in Part B, 1, of Appendix I, parents argued that their constitutional privilege against self-incrimination was violated by Maine's requirement for prior approval of home schools. The Court found no merit in this argument, noting that the privilege against self-incrimination applies only to criminal cases; this case involved a civil violation.

VI. UNREASONABLE SEARCHES

One of the issues in Blackwelder v. Safnauer, supra, was whether the enforcement mechanism of New York's home school approval requirement violated the 4th Amendment's prohibition against unreasonable searches. [See Appendix IV.] New York law required that educational services in a home school be "at least substantially equivalent" to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resided. The law was enforced through on-site visits by public school authorities or mutually agreed-upon third parties.

The Federal District Court said that the plaintiffs did not forfeit all reasonable expectations of privacy in their homes by utilizing their homes as schools. Thus, the Court had to determine whether conditioning an approval of home schooling on such visits was an "unreasonable search" within the meaning of the 4th Amendment when there was no procedure through which a warrant authorizing such visits could be obtained from a neutral judicial officer.

Examining established exceptions to the warrant requirement, the Court concluded that the on-site inspections were permissible under an exception which allows searches to be conducted with the consent of the party whose privacy is implicated. The Court rejected the home schoolers' argument that, by refusing to approve home schooling programs without first conducting an on-site inspection, the superintendents were using the powers vested in them by law to coerce the waiver of the plaintiffs' 4th Amendment rights. According to the Court, by refusing to consent to on-site visits, parents did not necessarily forfeit their right to teach their children at home; they still had an opportunity to convince a family court judge that their children were receiving an education meeting minimum state standards in an educational neglect proceeding.

VII. VAGUENESS OR IMPROPER DELEGATION OF AUTHORITY

All of the constitutional issues discussed in previous sections of this Memorandum related to the validity of a state's imposition of a particular type of regulation or a particular procedure for enforcing the state's regulations. In addition to those types of cases, a number of cases have raised the question of whether specific home school regulations are "void for vagueness" or an improper delegation of authority to the person making the approval decision. These issues arise under the Due Process Clause of the 14th Amendment to the U.S. Constitution. [Cases raising this issue with regard to requirements for the approval of home schools are briefly described in Part E of Appendix I and cases raising this issue with regard to teacher qualifications are briefly discussed in Part D of Appendix II.]

Generally, these cases involved statutory language which required that children in home schools receive instruction from "competent" or "qualified" teachers or tutors or that the instruction they receive be "substantially equivalent," "essentially equivalent" or "equal" in some respect to instruction in the public schools.

An important factor in some of these cases was whether the state had, in addition to the applicable statutory language, detailed regulations issued by the state education agency. The following three cases are illustrative:

a. In State v. Nestrom, 371 N.W. 2d 525 (Minn. 1985), the Minnesota Supreme Court found unconstitutional Minnesota's law which required that private schools, including home schools, be taught by teachers whose qualifications were "essentially equivalent" to the minimum standards for public school teachers of the same grades or subjects.

b. In Blackwelder v. Safnauer, supra, the Federal District Court upheld New York's requirement that children taught outside the public school system receive instruction that was at least "substantially equivalent" to that provided students in the public schools from a "competent" teacher. The District Court distinguished this law from the Minnesota law struck down in State v. Nestrom on the basis of the extensive regulations promulgated by the New York Department of Education and the ability of home schooling parents to clarify the meaning of a regulation and modify their behavior, either through their own inquiry or through an administrative process.

c. In Jeffrey v. O'Donnell, 701 F. Supp. 591 (N.D. Penn. 1988), the Federal District Court found unconstitutional a Pennsylvania statute which provided that instruction by a "properly qualified tutor" would constitute compliance with the compulsory attendance law. In striking down the law, the Court distinguished it from the New York law examined in Blackwelder v. Safnauer on the basis of the lack of clarifying regulations.

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APPENDIX I

APPROVAL OF HOME SCHOOLING PROGRAMS

APPROVAL OF HOME SCHOOLING PROGRAMS

This Appendix summarizes five cases involving challenges to requirements that home schools be approved by local school district officials. In all of these cases, the approval requirement or process was upheld.

A. NEW YORK CASE: BLACKWELDER V. SAFNAUER

In Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988), the plaintiffs' brought an action under 42 U.S.C. s. 1983, alleging various violations of their constitutional rights. The plaintiffs asserted that their religious beliefs compelled them to give their children a "Christian education," which they understand to be an education in which their religious values are interwoven into every area of study in which their children engage. They contended that allowing their children to attend public schools, where "religiously integrated" studies are prohibited, would violate their fundamental religious tenets. Particularly offensive to them was the study of evolution and what they termed an "amoral" approach to sex education in the public schools.

The challenged New York law required educational services provided to a minor "elsewhere than at public school" to be at least "substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." The law also required that such services be provided by "competent" instructors.

Under New York law, the primary responsibility for ensuring compliance with the compulsory education requirements rested with the local boards of education for the various school districts throughout the state. The superintendent of schools in each district commonly acted as the board's agent in carrying out that responsibility. The local boards had the initial responsibility of determining whether an alternative educational program, including a home schooling program, provided instruction "substantially equivalent" to that provided in the public schools in that school district and was provided by "competent" instructors. Such determinations were subject to review by the Commissioner of Education of the State of New York.

1. Free Exercise of Religion

In analyzing the plaintiffs' free exercise of religion claim, the Court applied the strict scrutiny framework set forth in Part I of the body of this Memorandum.

The plaintiffs argued that New York's compulsory attendance laws burdened their exercise of religion because the state retained the power to approve or disapprove the manner in which they accomplished what they viewed as a religious command; that is, the manner in which they educated their children.

The District Court said that, in applying the first part of the strict scrutiny test, a court is forced to distinguish between incidental governmental burdens on religious conduct and those governmental burdens of the type which rise to the level of a violation of the Free Exercise Clause. The Court said that it was not clear how the requirements of the New York law conflicted with the plaintiffs' beliefs or how the manner in which the requirements of the New York law were enforced by the state's local school districts impinged upon the plaintiffs' religious practices. It seemed to the Court that underlying the objection to the statutory requirement was a certain distrust of public school officials among home schoolers, including the plaintiffs. The Court said that, apparently, there was some fear that those charged with enforcing New York's compulsory attendance laws would require the teaching of secular matters that were inconsistent with the plaintiffs' fundamentalist Christian beliefs. However, the Court said that there was nothing in the language of the New York law that mandated such friction and noted that this case involved a facial challenge to the law.

The Court then went on to say that, even if the New York law burdened practices that were at the core of the plaintiffs' religion, the burden was justified by compelling state interests. Also, according to the Court, the law was as narrowly tailored as was feasible to accommodate the religious conduct at issue without sacrificing those important state interests. The District Court cited the U.S. Supreme Court for the proposition that "education is perhaps the most important function of state and local governments" [Brown v. Board of Education, 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954)]. The Court stressed two of the governmental interests involved. The first is a significant societal interest in the perpetuation of its political and economic structure; education has long been deemed vital to the preservation of a democratic system of government. The second interest is that education provides the basic tools by which individuals might lead economically productive lives to the benefit of all [citing Plyler v. Doe, 457 U.S. 202, 221, 102 S. Ct. 2382, 2396 (1982), Wisconsin v. Yoder, 406 U.S. at 221, 92 S. Ct. at 1536; and other U.S. Supreme Court cases].

The District Court also stressed that these are not the only matters of concern. Citing Wisconsin v. Yoder, the District Court said that when a child lacking the maturity and experience to make an independent judgment concerning the course of his or her educational future is denied the paramount privilege of an education which meets basic minimum standards, a compelling state interest is implicated.

The Court concluded that New York's compulsory education scheme seemed to be the least-restrictive means to serve the state's overriding governmental interest. It said that the "substantially equivalent" standard is flexible enough to allow local school officials to accommodate the special requirements of diverse religious groups without sacrificing the vital state interest at issue. According to the Court, there might be cases in which the manner the state enforces the compulsory attendance law unnecessarily infringes upon the free exercise rights of particular parents, but the mere possibility that such cases might arise was not enough to invalidate the law on its face.

2. Right to Direct Child's Education

The District Court also rejected the plaintiffs' claim that the New York law violated their rights to privacy under the Due Process Clause of the 14th Amendment. The Court said that the U.S. Supreme Court has long recognized that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Due Process Clause. However, the Court said that the degree of judicial scrutiny to be applied to a governmental action that interferes with the privacy interests is not clear. Specifically, the Court said that, in Meyer v. Nebraska, 262 U.S. at 399-400, 43 S. Ct. at 626-627, and Pierce v. Society of Sisters, 268 U.S. at 534-35, 45 S. Ct. at 573, the U.S. Supreme Court indicated that a parent's right to "establish a home and bring up children...to worship God according to the dictates of his own conscience" and "to direct the upbringing and education of children under their control" may not be interfered with by state action which is "arbitrary or without reasonable relation to some purpose within the competency of the state to effect." The District Court questioned, however, whether the U.S. Supreme Court's understanding of the "rationality analysis" in the mid-1920's was the same as under modern substantive due process analysis. Further, the Court said that more recent cases involving the constitutional right to privacy indicate that state regulations burdening such a right may be justified only by "compelling state interests" and must be narrowly drawn to further only those interests.

Without stating additional reasons, the District Court concluded, however, that whatever standard or review was applied, the New York compulsory attendance laws survived scrutiny.

3. Establishment of Religion

The plaintiffs, in Blackwelder v. Safnauer, also claimed that the New York compulsory education law violated the Establishment Clause of the First Amendment which prohibits Congress or the states from enacting laws respecting the establishment of religion (i.e., requires separation of church and state). First, the plaintiffs asserted that the statute

required that the "imprimatur" of the government be placed upon religious education as a condition to the practice of religious education. Second, they maintained that the home visits demanded by the superintendents constituted an excessive intrusion by public school officials into the operation of religious schools.

In analyzing this issue, the District Court used the three-part test set forth in Part IV of the body of this Memorandum.

First, the District Court found that the New York compulsory education law served the important state interest of preserving basic political and economic institutions, as well as assuring that children are intellectually and socially prepared to become self-reliant members of society. According to the Court, these were clearly legitimate secular purposes.

Next, the Court said that the law did not treat the plaintiffs any differently than it did other private schools in the state. Rather than communicating a message of disapproval of the plaintiffs' religion, the Court said that the state had attempted to accommodate the plaintiffs' religious beliefs while assuring that educational standards were maintained. On the other hand, the Court said that such accommodation did not approach the level where the government itself had advanced religion through its own activities or influence. Thus, the Court concluded that the New York law met the second part of the three-part test, that its primary effect neither advanced nor inhibited religion.

The Court then applied the third part of the Establishment Clause test. The plaintiffs maintained that the type of educational standards contemplated by New York, particularly the insistence of the superintendents on prearranged home visits during the instruction of the children, posed a significant threat of fostering the excessive entanglement of government with religion. The Court rejected this claim, stressing that ongoing inspections were not required (the defendant superintendents required one or two prearranged visits to the home instruction sites during the school year) and that the inspections were limited in purpose.

The plaintiffs also argued that a more pervasive involvement on the part of the state might occur if a home schooling program had difficulty in obtaining the approval of local school officials. The District Court rejected this argument saying that a certain amount of contact between government and religious organizations is inevitable and that no state interference with the religious training given students attending home schools was contemplated.

For a discussion of other issues related to these on-site visits, see Appendix IV.

B. MAINE CASES

1. State v. McDonough

In State v. McDonough, 468 A. 2d 977 (Maine 1983), the defendants appealed their convictions as persons in control of children who were habitually truant. Maine law required that home schools be approved by local school officials but the defendants refused to submit a home instruction proposal for approval.

a. Right to Direct Child's Education

The defendants claimed that the requirement, under the Maine law, that home schools be approved by local school officials violated their right to educate their children at home. The defendants based their claim on the guarantee in the 14th Amendment that no state shall deprive any person of liberty without due process of law.

In examining this claim, the Supreme Judicial Court of Maine did not apply the strict scrutiny analysis summarized in Part I of the body of this Memorandum. Instead, citing the U.S. Supreme Court decision in Wisconsin v. Yoder, the Court said that the requirement that parents seek the approval of public school authorities for home educational plans was fully justified by the state's "high responsibility" for the education of its citizens.

According to the Court, for the state to allow home education without imposing some standards as to quality and duration would be, in many cases, to allow parents to deprive their children of any education whatsoever. The Court said that not all parents who would hold their children out of school under such an unlimited exception would have the sincere desire to provide their children with adequate instruction. Furthermore, many parents, even though they have a sincere desire to educate their children at home, lack the necessary training and facilities to do so.

b. Self-Incrimination

In State v. McDonough, the Court found no merit in the defendants argument that their constitutional privilege against self-incrimination was violated by the prior approval requirement. The Court noted that the privilege against self-incrimination applies only to criminal cases (this case involved a civil violation).

2. Blount v. Department of Educational and Cultural Services

In Blount v. Department of Educational and Cultural Services, 551 A. 2d 1377 (Maine 1988), the plaintiffs sought a declaration that their home program was in compliance with Maine's compulsory attendance law and that any licensing powers asserted by the state violated their rights under the Free Exercise of Religion Clauses of the First Amendment of the U.S. Constitution and the Maine Constitution.

a. Free Exercise of Religion

In Blount v. Department of Educational and Cultural Services, the Maine Supreme Court noted that when it affirmed the validity of state regulation of home schooling in State v. McDonough (described immediately above), it observed that the defendants had not argued that the state interfered with their free exercise of religion.

In analyzing the plaintiff's First Amendment claim, the Maine Supreme Court applied the strict scrutiny analysis set forth in Part I of the body of this Memorandum. First, the Court noted that the sincerity of the plaintiffs' religious beliefs was unquestioned. With regard to the second part of the strict scrutiny analysis, the state argued that the plaintiffs had admitted, on cross-examination, that it was not a "fundamental tenet of being a fundamental Christian...that a parent should teach, must teach their children at home." However, the Court said that the issue was the plaintiffs' beliefs, not those of their co-parishioners, and the plaintiffs' testimony that God had called them to educate their children in their home was perfectly consistent with their testimony that they believed other families have different callings. The Court found that the burden on the plaintiffs' religious exercise was sufficient to trigger the strict scrutiny analysis.

According to the Maine Supreme Court, in applying the strict scrutiny analysis to a state's claim of a compelling interest, the Court must keep in mind that every individual's freedom of religion is itself one of the most compelling public interests. To justify a regulation that has been shown to diminish that freedom, the state must prove that the social purpose served by the challenged regulation is so essential that the loss of freedom is clearly outweighed by the benefit.

The Maine Supreme Court concluded that, in this case, the state had met its burden. The Court quoted the U.S. Supreme Court in Brown v. Board of Education, 347 U.S. at 493, 74 S. Ct. at 691, for the proposition that education is perhaps the most important function of state and local governments. The Maine Supreme Court stressed that it is important to recognize that the state interest is not simply an interest in education but an interest in the quality of education. According to the Court, it would eviscerate the state's interest in education to restrict it to

assuring the mere physical presence of school children in some facility purporting to be a classroom.

The Maine Court then concluded that prior approval of home schooling is the least-restrictive means by which the public interest in educational quality can be adequately fulfilled. The Court said that despite its categorical phrasing, the "least-restrictive means" analysis amounts to a balancing test: the state must prove that all less-restrictive means advanced by the plaintiffs would cause too much harm to the public interest in educational quality to justify the increased burden to the plaintiffs' exercise of religion. The state need not meet the impossible burden of proving that no adequate less-restrictive alternative can be developed; it need only show that none has been proposed.

The plaintiffs argued that one less-restrictive means would be to apply the "equivalent instruction" standard which applied to private schools in Maine. Maine law allowed a "non-approved private school" to file an annual letter which constituted sufficient evidence to establish that its students were receiving "equivalent instruction." Maine's rules for home schooling and guidelines for nonapproved private schools required teacher competence, compliance with state curriculum and calendar standards and assessment of students' academic progress. The home school rules differed from the guidelines for nonapproved private schools by requiring parents to apply to their local school board for approval, providing for closer supervision by local school officials and spelling out more detailed standards.

The Maine Supreme Court characterized the home schooling standards as "flexible," stating that parents could, for example, arrange for the assessment of the child's academic progress by annual standardized tests, by annual examination by a certified teacher or by review under the auspices of an official state or local home schooling advisory board. The Court also found flexible the provision of Maine law which allowed a home schooling program to either have a tutor who was eligible for state certification or be assisted by a satisfactory support system.

The plaintiffs also argued that the state's distinction between home schooling programs and private schools was arbitrary and that any valid reasons the state might have for supervising home schooling more closely than organized private schools could not be sufficiently compelling to allow the state to enforce this distinction against religious conscientious objectors. The Maine Supreme Court disagreed. It said the reason the state may monitor organized schools at a distance is the presence of an active intermediary and monitor--the parents. Parents, by the nature of things, cannot give their own home schooling program the same arm's-length supervision. According to the Court, the additional burden imposed on home schooling families is far outweighed by the benefit to the public interest in education.

The Maine Supreme Court also rejected the plaintiff's argument that other states, by their less-restrictive regulation of home schooling, have demonstrated that Maine has not chosen the least-restrictive means of fulfilling its compelling interest in educational quality. The Maine Supreme Court said that these other states' choices are entitled to no more deference than are any other proposed regulatory alternatives. According to the Court, the least-restrictive means need not be the lowest common denominator.

The Maine Supreme Court said that the less-restrictive alternative that the plaintiffs offered as the most promising was reliance on standardized testing. However, the Court said that this would satisfy neither the plaintiffs' interests nor the state's. The plaintiffs had testified that they could submit test scores to a school committee only if this was not part of an approval process. According to the Court, it strained the imagination to envision how testing could function as a substitute for state approval, rather than as a mechanism for approval. What, asked the Court, is the state's interest in having these scores in its archives if it is powerless to take any action on them?

b. Equal Protection

The plaintiffs also made an equal protection claim under the 14th Amendment. The Court said that this claim was a reprise of the plaintiff's previously-discussed argument that the distinction between home schooling programs and private schools is unconstitutional. According to the Court, this distinction had already withstood the plaintiff's strongest attack--its interference with religious exercise; the distinction did not become any more pernicious by being a "classification" subject to equal protection analysis.

The Court said that the equal protection claim could acquire independent value in this case only if questions regarding the burden on religion were set to one side and the equal protection issue was analyzed simply as an educational decision. In that case, the applicable test would be whether there was a "rational basis" for the distinction. The Court said that having already survived strict scrutiny under the First Amendment, the classification easily passed the rational basis test.

C. MASSACHUSETTS: CARE AND PROTECTION OF CHARLES AND OTHERS

Care and Protection of Charles and Others, 504 N.E. 2d 592 (Mass. 1987), involved an appeal of a determination that children being educated at home were in need of care and protection with respect to their educational care.

Massachusetts law required the school committee of each town to provide for and enforce the school attendance of all children residing in

the town. In this case, the school committee had accepted the recommendation of the school district superintendent to deny the parents permission to educate their children at home citing three major objections. First, the superintendent had not been given reason to believe that the parents were competent to teach their children. Second, the parents had indicated that the children would spend less time on formal instruction than would children in a public school. Third, the parents objected to the school district's efforts to monitor or observe the instructional methods used in the home school and periodically test the children to determine whether they were making reasonable progress.

1. Right to Direct Child's Education

The plaintiffs contended that the process for approving home schools in Massachusetts infringed upon their claimed right, under the 14th Amendment, to control the upbringing and education of their own children.

Citing Pierce v. Society of Sisters, 268 U.S. at 535, 45 S. Ct. at 573, and Meyer v. Nebraska, 262 U.S. at 399, 43 S. Ct. at 626, the Massachusetts Supreme Court said that the U.S. Supreme Court has made it clear that the liberty interests protected by the 14th Amendment extend to activities involving child rearing and education. Furthermore, the primary role of parents in upbringing their children is now established beyond debate as an enduring American tradition.

The Court agreed with the parents that they possessed a basic right to direct the education of their children but said that this right is not absolute--it must be reconciled with the substantial state interest in the education of its citizenry. The Massachusetts Court also agreed with the parents that the state's interest is not in educating all children or in dictating the educational process in the minutest detail, but only in knowing that the children are being educated. However, the Court concluded that the Massachusetts approval process was necessary to promote that substantial state interest. The Court said that, without an approval process, the state would be powerless to assert its interest in the case of a child who is being "otherwise instructed."

The Court did not analyze this claim in terms of the strict scrutiny test set forth in Part I of the body of this Memorandum, but citing the Maine Supreme Court's decision in State v. McDonough, described in Section B, 1, of this Appendix, the Court said that the approval process was necessary to promote the state's substantial interest.

2. Free Exercise of Religion

The Court said that it recognized that the parents had also presented arguments based on the Free Exercise of Religion Clause of the First

Amendment. However, the Court said that because it concluded that parents have a basic right, under the 14th Amendment, to direct the educational upbringing of their children, it need not address the First Amendment arguments. According to the Court, neither the First Amendment nor the relevant provisions of the Massachusetts Constitution would entitle the parents to any greater protection than the Court granted them in its opinion.

D. OHIO CASE: STATE V. SCHMIDT

The plaintiffs in State v. Schmidt, 505 N.E. 2d 627 (Ohio 1987), cert. den., 484 U.S. 942, 108 S. Ct. 327, were "born-again Christians" who believed that it was their undelegable duty as parents to educate their daughter themselves. The defendants were prosecuted for violating Ohio's compulsory attendance law by not sending their daughter to school. The Ohio law required that application be made to the local superintendent of schools for approval of a home education program.

Free Exercise of Religion

The defendants argued that the approval requirement violated their rights to free exercise of religion under the First Amendment.

Applying the strict scrutiny analysis described in Part I of the body of this Memorandum, the Ohio Supreme Court concluded that the defendants failed to demonstrate that the approval requirements of the Ohio law would have infringed upon their right to free exercise of religion. According to the Court, the Ohio law acknowledged the right of parents to educate their children and guarded against the abuse of that right by requiring parents to obtain approval for the home education program from the local school district superintendent. Despite an invitation from the superintendent to discuss their plan for educating their daughter at home, the plaintiffs failed to submit a proposal requesting that approval.

The Ohio Supreme Court refused to speculate as to what the result might have been had the defendants submitted a proposal and refused to presume that the superintendent's actions would have been unconstitutional. The Court said that without an application and proposal from the plaintiffs, there was no way to balance the plaintiffs' right to free exercise of religion against the state's interest. Therefore, the Court did not reach the question of whether the state had a compelling interest or whether that interest could be achieved through a "lesser infringement" on the plaintiff's right to free exercise of religion.

The Court went on to hold that the requirement that parents seek the superintendent's approval for their home education program reasonably

furthered the state's interest in the education of its citizens and did not infringe upon the free exercise of religion.

See Part D of Appendix II for a brief summary of vagueness and delegation of authority issues raised in this case, regarding Ohio's teacher qualification approval requirement.

E. VAGUENESS AND IMPROPER DELEGATION OF AUTHORITY

In addition to questioning the validity of requiring approval of home schools, two of the cases described above in this Appendix upheld home school approval laws against challenges that they were unconstitutionally vague under the "void for vagueness" doctrine or an improper delegation of authority to the person making the approval decision. These cases include:

1. Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988) (also described in Section A of this Appendix). The Court upheld, against a vagueness challenge, the requirement that minors in home schools receive instruction from a "competent teacher" and that the instruction be at least "substantially equivalent" to that provided students in the public schools. The Court said that the New York home school law was not vague on its face because it was beyond dispute that a parent who withdrew his or her child from public school and afforded that child no education whatsoever would be in violation of the law. With regard to application of the law in this particular case, the Court noted that the law established a comparative standard that made direct reference to the minimum educational standards for the state's public schools. The Court found that the standards governing public schools were sufficiently comprehensible, noting various statutes, regulations and guidelines governing days of instruction, recordkeeping and the substantive content of the studies of public school children.

2. Care and Protection of Charles and Others, 504 N.W. 2d 592 (Mass. 1987) (also described in Section C of this Appendix). Massachusetts law required the school committee of each town to provide for and enforce the school attendance of all children residing in the town. The parents argued that the law was vague because it failed to provide any standards or procedures for approval. The Massachusetts Supreme Court upheld the law, noting that home schools fell under the law's enunciated standard of approval for private schools: that the studies required by law be "equal, in thoroughness and efficiency, and in progress made therein," to those in the public schools in the same town. The statutes also set forth subjects to be taught in public schools and requirements for teacher qualifications. The Court also said that an important factor in a vagueness challenge is whether the law threatens to inhibit the exercise of a constitutionally protected right and the Massachusetts law

specifically prohibited a school committee from withholding approval of private schools on account of religious teachings.

In Care and Protection of Charles and Others, the parents also argued that the law was an unlawful delegation of legislative power to the superintendent and the school committee. The Court said that the Legislature may delegate to a board or officer the working out of the details of a policy adopted by the Legislature; although school committees exercised considerable discretion, it was not unbridled.

The Court concluded that if there was any lingering doubt on these issues, they would be resolved by recognition of the guidelines the Court set down in its opinion for the assistance of parents and school committees.

APPENDIX II

INSTRUCTOR QUALIFICATIONS

INSTRUCTOR QUALIFICATIONS

This Appendix summarizes 13 cases in which courts have examined constitutional issues related to state requirements that home school teachers be certified or meet other qualifications. With the exception of two of the "vagueness" cases summarized in Section D of this Appendix, all of the teacher qualification requirements examined in these cases were upheld.

A. MICHIGAN CASES

1. Hanson v. Cushman

In Hanson v. Cushman, 490 F. Supp. 109 (W.D.S.D. Mich. 1980), the Federal District Court for the Western District of Michigan, Southern Division, upheld a Michigan law requiring state certification of all persons who give instruction to children in the state, as that law applies to home schools. The plaintiffs brought an action under 42 U.S.C. s. 1983, alleging the deprivation under color of state law of rights protected by the U.S. Constitution.

a. Right to Direct Child's Education

The plaintiffs claimed that the parental right to control the education of their children was protected by the penumbras of the first nine Amendments and the 14th Amendment to the U.S. Constitution.

The District Court stated that the case "stands or falls" on the plaintiffs' argument that the claimed right to control the education of their children rises to the level of a fundamental constitutional right. According to the Court, the plaintiffs cited no cases holding that parents have a fundamental constitutional right to educate their children in their home nor had the Court's own research uncovered any such cases. Rather, according to the Court, the plaintiffs attempted to establish their right through reliance upon dicta from several U.S. Supreme Court decisions, including Meyer v. Nebraska and Pierce v. Society of Sisters. In addition, the District Court noted that the plaintiffs relied on Wisconsin v. Yoder. However, the District Court distinguished the plaintiffs' claim from the claims of the Amish in Wisconsin v. Yoder stressing that the plaintiffs' claim was not based on religious belief.

The District Court concluded that the plaintiffs' claimed right to educate their children through a program of home study free from the requirement of compliance with the teacher certification law did not rise above a "personal or philosophical choice" and, therefore, was not within the bounds of constitutional protection. The Court said that the plaintiffs had established no fundamental right that was abridged by the

Michigan law. Thus, the state did not need to demonstrate a "compelling interest" but only that it acted "reasonably" in requiring children to attend school and requiring that children be taught only by certified teachers.

b. Equal Protection

The plaintiffs also made an equal protection claim, arguing that the state was treating parents who wished to educate their children at home differently depending upon whether or not the parents were certified teachers.

The District Court said that this distinction did not have any adverse impact peculiar to a member of a constitutionally-protected suspect class and no "fundamental" right was involved. Therefore, the traditional standard of review used in equal protection cases required only that there be a "rational relationship" between the distinction being made between the two classes of parents and a legitimate state purpose.

The Court found such a rational relationship based upon the difficulty and expense that the state would have in examining and supervising a "host of facilities and individuals, widely scattered," who might instruct their children at home without certification, as compared to the less difficult and less expensive mechanism of requiring certification. According to the District Court, this clearly satisfied the state's burden of acting "rationally and reasonably."

2. People v. De Jonge

The defendants, in People v. De Jonge, 179 Mich. App. 225, 449 N.W. 2d 899 (1989), were parents who had been found guilty of violating Michigan's compulsory attendance law. The case involved children who were taught at home through a program administered by the Church of Christian Liberty and Academy of Arlington Heights, Illinois. The parents contended that Michigan's teacher certification requirement violated their First Amendment right to free exercise of their religious beliefs and their 14th Amendment fundamental right to educate their children.

a. Free Exercise of Religion

Examining the defendants' free exercise of religion claim, the Michigan Court of Appeals substantially followed the strict scrutiny analysis set forth in Part I of the body of this Memorandum. However, the Court referred to a "less obtrusive" form of regulation, rather than the "least-restrictive" means.

The Michigan Court found that the defendants had a sincere religious belief that they had the sole responsibility and authority to educate

their children. However, the Court also found that the burden imposed on the defendants' religious beliefs by the teacher certification requirement was minimal. The Court noted that the defendants' religious beliefs did not prohibit them from hiring certified teachers and the defendants had failed to show that they could not hire a certified teacher who met their qualifications. The Court also said that all of the state certification requirements could be fulfilled through attendance at either religious or nonreligious institutions and that the teacher certification regulations did not require anyone to attend courses taught from a perspective contrary to their beliefs. Therefore, the Court held that the infringement on free exercise rights was minimal and outweighed by the state's interests.

In addition, the Court of Appeals held that the state has a compelling interest which justifies the "minimal" burden on religious freedom imposed by teacher certification. The Court noted Michigan's intense concern about the quality of education of its citizens stating that such concern has been evident in each of its Constitutions, its case law and a long line of legislative enactments.

With regard to the fourth element of the four-part strict scrutiny analysis, the Michigan Court of Appeals held that the certification requirement was the least-obtrusive means of achieving the state's interest. According to the Court, the defendants did not propose an alternative and based their position on the assertion that most other states do not require certified teachers in home schools. The Court said that the defendants argued, implicitly, that curriculum and attendance requirements were sufficient to protect the state's interests.

The Court disagreed. According to the Court, curriculum and attendance requirements ensure that the student and the educational material are in the same place at the same time. However, they do nothing to ensure that the material is imparted to the child in such a way as to be understandable. Alone, curriculum and attendance requirements are unlikely to stimulate intellectual curiosity and inquiry or creative thought. The Court said that state licensure would not guarantee quality teachers but one could not ignore the "high likelihood" that a person who meets the qualifications for certification has absorbed the knowledge a competent teacher should have.

b. Right to Direct Child's Education

The Court said that since it had determined that the certification requirement did not violate the rights of free exercise of religion under the First Amendment, it need not analyze the defendants' claim to a 14th Amendment right to educate their children at home. According to the Court, there is no stricter standard of review than that imposed by the First Amendment.

However, the Court went on to express its disagreement with the defendants' assertions as to the applicable standard of review where the issue is the parents' right to control their children's education. Citing Hanson v. Cushman (summarized above in this Appendix), the Court said that the correct test is whether the state's regulation bears a "rational relationship to some legitimate state purpose," not whether governmental regulation is justified as necessary to achieve a compelling state interest. The Court said that the state certification requirement met the rational relationship standard.

3. Clonlara v. Runkel

The plaintiffs in Clonlara v. Runkel, 722 F. Supp. 1442 (E.D.S.D. Mich. 1989), brought a federal civil rights action under 42 U.S.C. ss. 1983, 1985 and 1986, alleging a deprivation of the right to educate their children at home, denial of due process and a conspiracy to violate their civil rights.

a. Right to Direct Child's Education

The plaintiffs alleged that they had a fundamental right to privacy, protected by the Due Process Clause of the 14th Amendment, which includes a right to raise, nurture and control the education and upbringing of their children.

The Federal District Court for the Eastern District, Southern Division, Michigan cited the Federal District Court's decision in Hanson v. Cushman (summarized above in this Appendix) for its analysis of the U.S. Supreme Court decisions in Pierce v. Society of Sisters, Meyer v. Nebraska and Wisconsin v. Yoder. In addition, in Clonlara, the Court emphasized that, in Wisconsin v. Yoder, the U.S. Supreme Court characterized the fundamental right involved as the right to direct their child's religious upbringing, not their child's education per se.

Rejecting a strict scrutiny analysis, the Court said that no case has yet found a generalized right to privacy under the Constitution which would allow parents to home school their children free from reasonable government regulation. According to the Court, the plaintiffs neither alleged nor argued that the requirement that home schooled children be taught by certified teachers was unreasonable. The Court had not been asked to and did not reach the question concerning the reasonableness of such a regulation.

b. Equal Protection

The plaintiffs also made an equal protection claim, under 42 U.S.C. s. 1985 (3), alleging that they were members of a class of people who

wished to provide for their children's education at home. The Court said that the statute only applied to "class-based invidiously discriminatory animus"; that is, the class must be based on race, ethnic origin, sex or religion.

According to the Court, the classes protected by 42 U.S.C. s. 1985 (3) are rooted in traditional equal protection analysis. Thus, the Court held that the plaintiffs could not sustain this claim under 42 U.S.C. s. 1985 (3).

B. NORTH DAKOTA CASES

1. State v. Patzner

The defendants in State v. Patzner, 382 N.W. 2d 631 (N.D. 1986), cert. den., 469 U.S. 825, 107 S. Ct. 99, were parents who had refused to send their children to school and instead sought to educate them in their homes. The parents were convicted of violating North Dakota's compulsory attendance laws. None of the parents was a certified teacher or certifiable under the North Dakota law, nor were their children being taught by certified teachers in the homes.

a. Free Exercise of Religion

The parents asserted that the state certification requirement was a violation of the Free Exercise of Religion Clause of the First Amendment.

In State v. Patzner, the North Dakota Supreme Court set forth the applicable analysis as a three-part test, rather than the four-part strict scrutiny analysis summarized in Part I of the body of this Memorandum. The difference between the North Dakota Supreme Court's statement of the test and the statement given in Part I of the body of this Memorandum relates to the third and fourth elements of the test as stated in Part I. The North Dakota Supreme Court replaced those elements with the requirement that the state have a compelling interest in the regulation which justifies the burden on the free exercise of religion and "overrides the interest" of the parents in exercising their religious practices. However, in applying its test, the North Dakota Supreme Court indicated that the state must bear the burden of demonstrating the unavailability of less restrictive means of achieving its aims.

In State v. Patzner, there was no dispute that the parents' decisions to educate their children in their homes were motivated by sincerely-held religious beliefs. However, the state contended that the defendants failed to establish that the compulsory attendance statutes imposed a burden upon the free exercise of their religious beliefs. The Court disagreed, noting that the claim made was that the parents' religious beliefs dictated that they educate their children at home, but the parents

did not have and could not, without substantial hardship, obtain the educational requirements necessary for teacher certification and state approval of their home schools.

After finding a burden on the defendants' religious beliefs, the Court said that its next inquiry was whether there was a state interest of sufficient magnitude to "override the interest" claimed to be protected under the Free Exercise of Religion Clause. As discussed above, the Court said that only a compelling state interest can justify burdening the free exercise of religion and the state must bear the burden of demonstrating the unavailability of less restrictive means of achieving its aims.

The Court had no trouble finding a compelling state interest. It noted that the state's interest in the education of its children had been characterized by the U.S. Supreme Court as "perhaps the most important function of state and local governments" [citing Brown v. Board of Education, 347 U.S. at 493, 74 S. Ct. at 691]. Also, the Court said that the circumstances in this case lacked the exceptional circumstances present in Wisconsin v. Yoder. Among other distinctions, the Court said that the defendants, unlike the Amish, were not members of a community with a long history of being a successful, self-sufficient segment of society.

The defendants argued that the state had failed to meet its burden of showing that the teacher certification requirement constituted the "least-restrictive means" of ensuring that its primary interest in the education of children was met. The defendants claimed that teacher certification could not be the least-restrictive means because most other states in the country had done away with teacher certification requirements for home and private schools.

The Court reviewed other means of achieving the state's interests. It said that standardized testing does not reveal possible deficiencies until the end of a school term and would likely not satisfy the state's interest. It noted that some states had enacted educational "equivalency statutes" in an attempt to accommodate home schools without requiring certification of parents, but that such statutes had undergone numerous vagueness challenges. The Court also said that having local or state officials make subjective evaluations of parents' ability or lack of ability to teach their children might very well be considered a more restrictive or intrusive measure of gauging the parents' qualifications as educators than the teacher certification requirement.

In conclusion, the Court found that the balance in this case was in favor of the state teacher certification requirement.

2. State v. Anderson

In State v. Anderson, 427 N.W. 2d 316 (N.D. 1988), cert. den., __ U.S. __, 109 S. Ct. 491, the defendants appealed their convictions for violating North Dakota's compulsory attendance law. Among other things, they contended that the North Dakota teacher certification and advance governmental approval requirements violated both the Establishment Clause and the Free Exercise of the First Amendment to the U.S. Constitution.

a. Free Exercise of Religion

In making their claim that the compulsory school attendance law violated the Free Exercise of Religion Clause of the First Amendment, the defendants attempted to differentiate their case from State v. Patzner (summarized above in this Appendix). Based on a study done at the request of the North Dakota Superintendent of Public Instruction, the defendants argued that the state's own experts now conceded that less restrictive alternatives would satisfy the state's compelling interest in education.

In rejecting this argument, the North Dakota Supreme Court said that it was not persuaded that the proposals necessarily provided less restrictive alternatives which satisfied the state's compelling interest in education and avoided excessive entanglement of government with religion proscribed by the Establishment Clause of the First Amendment (discussed below). Accordingly, it adhered to its decision in State v. Patzner that teacher certification does not violate the Free Exercise of Religion Clause of the First Amendment.

b. Establishment of Religion

The defendants also claimed that the North Dakota certification and approval requirements violated the Establishment Clause of the First Amendment, which prevents Congress or the states from enacting laws respecting the establishment of religion (i.e., requires separation of church and state).

After summarizing the three-part test set forth in Part IV of the body of this Memorandum, the North Dakota Supreme Court discussed a U.S. Circuit Court of Appeals decision in Stark v. St. Cloud State University, 802 F. 2d 1046 (8th Cir. 1986). In that case, St. Cloud University, a Minnesota public university, permitted students seeking to become licensed teachers to fulfill student teaching requirements by instructing at a parochial high school. Under the circumstances of the case, the Court of Appeals concluded that the participating parochial schools were pervasively sectarian institutions and that the University student-teaching program could not help but communicate a message of government endorsement of the parochial schools and their religious messages.

Next, the North Dakota Supreme Court described the U.S. Supreme Court's decision in Aguilar v. Felton, 473 U.S. 402, 105 S. Ct. 3232 (1985). In that case, New York City used federal funds to pay salaries of public school employes who taught in parochial schools and were supervised by field personnel who made at least one unannounced visit per month. The field supervisors reported to program supervisors who also made occasional unannounced visits to monitor classes in parochial schools. The U.S. Supreme Court held that this program violated the Establishment Clause because the state supervision and administrative cooperation required to monitor the educational program required permanent and pervasive state presence in the sectarian school receiving aid, thus, entangling the church and state in a way that violated the Establishment Clause.

The North Dakota Supreme Court found that the North Dakota's home school teacher certification and approval requirements did not present the same problems as the cases just described, stating (without detailed analysis of the specific requirements of the North Dakota law) that the requirements did not have a primary effect of advancing or inhibiting religion and did not foster an excessive entanglement with religion.

Citing the U.S. Supreme Court in Lemon v. Kurtzman, supra, the North Dakota Supreme Court said that the Establishment Clause does not call for a total separation between church and state; some relationship between the government and religious organizations is inevitable. Specifically, the Court quoted the U.S. Supreme Court's statement that: "Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts" [emphasis added; Lemon v. Kurtzman, 403 U.S. at 614, 91 S. Ct. at 2112].

3. State v. Melin

In State v. Melin, 428 N.W. 2d 227 (N.D. 1988), cert. den., ___ U.S. ___, 109 S. Ct. 367, the state appealed from a trial court's dismissal of a complaint charging the defendants with violating North Dakota's compulsory school attendance law.

Free Exercise of Religion

Among other things, the defendants in State v. Melin argued that North Dakota's teacher certification requirement infringed upon their First Amendment right to freely exercise their religion. As in State v. Anderson, these defendants argued that new evidence differentiated their case from State v. Patzner, citing the study done for the Superintendent of Public Instruction. The Court again rejected that argument, this time noting that the Legislature had declined to adopt those recommendations when they were submitted to it in the 1987 North Dakota Legislative Session. Again, the North Dakota Supreme Court adhered to its holding in State v. Patzner.

4. State v. Toman

In State v. Toman, 436 N.W. 2d 10 (N.D. 1989), defendants appealed their convictions for violations of the North Dakota's compulsory school attendance law.

Free Exercise of Religion

One of the issues raised by the defendants on appeal was that the teacher certification requirement for religious schools was not the least-restrictive alternative to achieving the state's interest in providing adequate education for children. The North Dakota Supreme Court said that this issue had been resolved by the Court in prior decisions, citing State v. Anderson and State v. Patzner.

C. ALABAMA CASE: JERNIGAN V. STATE

In Jernigan v. State, 412 So. 2d 1242 (C.C.A. Ala. 1982), the Court of Criminal Appeals of Alabama reviewed the defendants' conviction for causing their children's truancy, dependency or need of supervision based on the defendant's failure to send the children to school in compliance with Alabama's compulsory school attendance law. The defendants were practicing Catholics who belonged to a Catholic Order called the Society of St. Pius X. The educational doctrines of their order were based on the traditional Catholic position that the education of children is a primary responsibility of the parents and that the children should be brought up in a Catholic educational environment. Based on their religious convictions, the defendants refused to send their children to the local public school. There was no parochial school in the county in which the defendants lived. The defendants began educating their children at home using a Catholic correspondence course.

Mrs. Jernigan, who was instructing the children, was unable to qualify under Alabama law as a "private tutor" because she did not have a college degree or formal educational training which would allow her to qualify for a teacher's certificate.

1. Free Exercise of Religion

The defendants asserted that the state must permit them to educate at home as an incident of their right to free exercise of religion. In reviewing this claim, the Alabama Criminal Court of Appeals did not apply the strict scrutiny analysis described in Part I of the body of this Memorandum. Instead, it discussed the case in terms of the U.S. Supreme Court's decisions in Wisconsin v. Yoder and Meyer v. Nebraska.

The Alabama Court of Criminal Appeals said that, while the sincerity of the defendants' beliefs was not questioned, other aspects of this case were significantly different from those in Wisconsin v. Yoder. The Alabama Court noted, among other things, that the Amish parents in Wisconsin v. Yoder did not object to elementary education through the first eight grades. According to the Court, the defendants sought to exempt their children from all public education without any showing that the home education they practiced was an adequate substitute or replacement. Also, according to the Court, there was no indication of Mrs. Jernigan's competence or ability to teach her own children other than the bare fact that she had a high school diploma. The Court said that, unlike the Amish parents in Wisconsin v. Yoder, the defendants had not demonstrated that their home teachings were successful in preparing their children for life, that their entire way of life is inextricable from their religious beliefs or that public schooling would substantially interfere with their religious practices.

Balancing the interests of the state against the religious interests asserted by the defendants, the Alabama Court held the teacher certification requirements did not violate any First Amendment right of freedom of religion.

2. Right to Direct Child's Education

In addition to their religious claims, the defendants, in Jernigan v. State, made a 14th Amendment argument that their liberty, privacy and family integrity were violated by the teacher certification requirement.

The Alabama Criminal Court of Appeals rejected this claim citing the U.S. Supreme Court's decision in Meyer v. Nebraska, 262 U.S. at 400, 43 S. Ct. at 627, for the proposition that education of the young is only possible in schools conducted by specially-qualified persons who devote themselves to educating the young. The Alabama Court found that statement to be equally true for children who receive their education in the home and an ample justification for what it characterized as the state's "reasonably narrow requirement" of certification. The Court also found that there was no unreasonable unconstitutional interference with the right to family integrity.

D. VAGUENESS AND IMPROPER DELEGATION OF AUTHORITY

Rather than, or in addition to, questioning the validity of imposing teacher certification or other teacher qualification requirements, a number of cases have raised the question of whether requirements relating to home school teacher qualifications (other than certification) are unconstitutionally vague under the "void for vagueness" doctrine or an improper delegation of authority to the person making the determination

regarding whether a teacher is qualified. These issues arise under the Due Process Clause of the 14th Amendment to the U.S. Constitution. These cases include:

1. State v. Riddle, 285 S.E. 2d 359 (W. Va. 1981). The Supreme Court of Appeals of West Virginia upheld, against a vagueness challenge, a provision of West Virginia's law which required that instruction in home be conducted by persons who, in the judgment of the county superintendent and county board of education, were qualified to give instruction in the topics to be taught in the free elementary schools of the state. The Court upheld this law characterizing the requirement as "flexible" rather than vague. The Court said that the requirement was sufficiently definite that an arbitrary and capricious refusal to grant approval to qualified instructors could be corrected by an action for a declaratory judgment or an action in mandamus (e.g., an action to compel an office to great approval).

2. State v. Newstrom, 371 N.W. 2d 525 (Minn. 1985). Minnesota law required that private schools (including home schools) be taught by teachers whose qualifications were "essentially equivalent" to the minimum standards for public school teachers of the same grades or subjects. The Minnesota Supreme Court held that the law was unconstitutionally vague for the purpose of imposing a criminal penalty. The Court said that the law could not be read as requiring teachers to meet formal education criteria, even though to do so would cure the law of lack of specificity.

3. State v. Schmidt, 505 N.E. 2d 627 (Ohio 1987), cert. den., 484 U.S. 942, 108 S. Ct. 327. Ohio law authorized school districts to make initial determinations as to who was qualified to give home instruction and required parents to receive approval from the local school district superintendent before removing a child from school to a home education program. Ohio law required instruction in a home education program to be given by a person qualified to teach the branches in which instruction was required and such additional branches as the advancement and needs of the child, in the opinion of the local superintendent, required. The Ohio Supreme Court upheld those requirements against challenges of vagueness and improper delegation of authority. According to the Court, Ohio law gave the superintendents an intelligible principle for guidance and the desirable flexibility to accommodate home school programs. Also, an arbitrary and capricious refusal by a superintendent could be corrected under the law's appeal procedures.

4. Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988). New York law provided that minors taught outside the public school system must receive instruction that was at least "substantially equivalent" to that provided students in the public schools from a "competent" teacher. The Federal District Court distinguished this law from the Minnesota law struck down in State v. Newstrom on the basis of the extensive regulations promulgated by the New York Department of Education and the ability of

home schooling parents to clarify the meaning of a regulation and modify their behavior, either through their own inquiry or through an administrative process. [Also, see the descriptions of this case in Parts A and E of Appendix I.]

5. Jeffrey v. O'Donnell, 701 F. Supp. 519 (N.D. Penn. 1988). The Pennsylvania statute provided that instruction provided by a "properly qualified private tutor" would be considered as compliance with the compulsory attendance law. The Pennsylvania Department of Education issued regulations which lacked a definition of "qualified private tutor." In striking down the Pennsylvania law, the Court distinguished it from the New York law examined in Blackwelder v. Safnauer on the basis of the lack of clarifying regulations.

Also, in Clonlara v. Runkel, supra (also summarized in Section A, 3, of this Appendix), the Federal District Court held that Michigan's compulsory attendance law was not unconstitutionally vague with regard to teacher qualifications, noting that teacher certification was required. The Court held that the certification requirement and requirements that sanitary conditions and courses of study should be the same as in the public schools provided adequate notice of the conduct required to parents and to avoid arbitrary enforcement. That case also discusses the application of the "void for vagueness" doctrine to criminal cases and mentions its application in cases involving fundamental constitutional rights.

APPENDIX III

STANDARDIZED TESTING

STANDARDIZED TESTING

This Appendix summarizes the decision of the U.S. Court of Appeals for the 8th Circuit upholding an Arkansas requirement that standardized tests be given to home school students under the supervision of a test administrator.

ARKANSAS CASE: MURPHY V. ARKANSAS

The plaintiffs in Murphy v. Arkansas, 852 F. 2d 1039 (8th Cir. 1988), were Evangelical Christians who believed that Christian scriptures required them, as parents, to take personal responsibility for every aspect of their children's training and education. They challenged Arkansas laws relating to home schools as violating their rights under the Free Exercise of Religion Clause of the First Amendment and the Equal Protection Clause of the 14th Amendment. They also alleged a violation of their constitutional right to privacy.

1. Free Exercise of Religion

The parties stipulated that the Arkansas testing requirements interfered with the plaintiffs' sincerely-held religious beliefs. Thus, the Court said that the resolution of the plaintiffs' claim under the Free Exercise of Religion Clause of the First Amendment involved answering two questions: does the state have a compelling interest in the education of all children and, if so, is the statutory scheme the least-restrictive means of achieving that objective?

Citing the Northwest Ordinance, the U.S. Supreme Court decisions in Wisconsin v. Yoder, 406 U.S. at 221, 925 S. Ct. at 1536, Brown v. Board of Education, 347 U.S. at 493, 74 S. Ct. at 691, and Board of Education v. Allen, 392 U.S. at 245-46, 88 S. Ct. at 1927-28, the Court of Appeals said that it is settled beyond dispute, as a legal matter, that the state has a compelling interest in ensuring that all its citizens are being adequately educated.

Examining the question of whether the testing requirement was the least-restrictive means to achieve the state's interest, the Court said that the state must have a mechanism by which it can confidently and objectively be assured that its citizens are being adequately educated. According to the Court, upon examination, it would appear that Arkansas created the least-restrictive system possible to assure its goal. By providing the option of home schooling, Arkansas allowed parents vast responsibility and accountability in terms of their children's education--control far in excess of that required under previous cases. [The Court cited its previous decision in Fellowship Baptist Church v.

Benton, 815 F. 2d 485 (8th Cir. 1987), upholding Iowa's teacher certification requirement as it applied to private "church" schools; and the lower court's decision in that case, upon remand, upholding regulations prescribing curriculum in such schools, 678 F. Supp. 213 (S. Ct. Iowa 1988).]

The Court said that even regarding the standardized testing requirement, the State of Arkansas allows wide latitude to the parents. Parents may choose a test administered from a list of nationally-recognized standard achievement tests and may be present when the test is being administered.

Finally, the Court said that the plaintiffs made no showing, as made by the Amish in Wisconsin v. Yoder, that the state can be assured that its interest will be attained if their religious beliefs are accommodated. The Court specifically rejected the plaintiffs' argument that parental testing of children provides a sufficient safeguard to assure the state's interest. Similarly, the Court said that parental affidavits concerning the children's progress would be insufficient.

2. Equal Protection

The plaintiffs argued that the Arkansas law violated the Equal Protection Clause of the 14th Amendment. Specifically, they claimed that those who school their children at home for religious reasons are a suspect class or, alternatively, that parental control over a child's education involves a fundamental right. They argued that because the law discriminated against this class or burdened this right, it failed the strict scrutiny test of the Equal Protection Clause.

The plaintiffs made an additional equal protection argument based on the features of the Arkansas law which required various filings with the local school district superintendent, testing by the state and remedial action for unsatisfactory test results, while no such requirements were imposed on persons who educated their children in public or private schools. Also, the plaintiffs noted that although Arkansas public schools are subject to pervasive regulation, private schools in Arkansas are virtually free of any such supervision. Thus, the plaintiffs contended that the state appeared to "irrationally" allow parents to educate their children in religious private schools without any state regulatory supervision, but subjected children schooled at home to various requirements.

The Circuit Court of Appeals said that it could be argued that the Arkansas law, while superficially neutral, had a discriminatory impact on the category of deeply religious individuals impelled by their convictions to school their children at home. However, the Court said that even if such discriminatory impact was shown, it would not be sufficient to invoke

strict scrutiny. The plaintiffs would still bear the burden of proving discriminatory purpose or intent and no such showing had been made.

The Court of Appeals also rejected the argument that strict scrutiny be applied to the equal protection claim because a fundamental right was involved. The Court said that no persuasive arguments had been advanced that there was a fundamental right of parents to supervise their children's education to the extent that the plaintiffs contended. According to the Court, recognition of such a right would "fly directly in the face" of cases in which the U.S. Supreme Court has recognized a broad power of the state to compel school attendance and regulate curriculum and teacher certification, citing Board of Education v. Allen, 392 U.S. at 245-46, 88 S. Ct. at 1927-28; Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S. Ct. at 571, 573. Thus, the Court did not apply strict scrutiny to the equal protection claim.

The Court then addressed the question of whether there was a rational reason to subject home schooling to regulatory requirements, while at the same time freeing private schools from virtually any regulation. The Court said that this step by the Arkansas Legislature may, at first glance, offend common sense and, sitting as a Legislature, the Court might not have made the same decision. However, the Court said that it could be argued that the notion of an actual independent school away from home implies more formality and structure than a home school. This could lead the state to believe that more serious instruction would be occurring in the independent school than in the relaxed atmosphere of a child and parents in their home.

In addition, the Court said that the notion that more than one family is likely to be sending their children to the private school may provide an additional objective indication of the private school's quality that is not present in the context of individual home schools.

Finally, the Court said that, unlike a home school, parents sending a child to a private school have to pay money for education and, therefore, would be more likely to demand their money's worth of instructional quality from the private school.

3. Right to Direct Child's Education

The Court of Appeals rejected the plaintiffs' argument that the "right of privacy" should be extended to protect parental decisions concerning the direction of a child's education from state interference. The Court of Appeals said that the U.S. Supreme Court had specifically rejected this contention, acknowledging the power of the state to reasonably regulate all schools [citing Runyon v. McCrary, 427 U.S. 160, 96 S. Ct. 2586 (1976)].

APPENDIX IV

ON-SITE INSPECTIONS

ON-SITE INSPECTIONS

This Appendix summarizes a portion of a case in which the Federal District Court for the Northern District of New York reviewed whether required on-site inspections of home schools, by public school authorities or mutually agreed-upon third parties, were "unreasonable searches" under the 4th Amendment to the U.S. Constitution.

NEW YORK CASE: BLACKWELDER V. SAFNAUER

As described in Part A of Appendix I, the New York law challenged in Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y. 1988), required that educational services provided to a minor "elsewhere" than at a public school be "at least substantially equivalent" to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resided. The law was enforced through on-site visits by public school authorities or mutually agreed-upon third parties. The plaintiffs argued that the on-site visits violated their right to privacy guaranteed by the 4th and 14th Amendments to the U.S. Constitution and violated the Establishment Clause of the First Amendment allowing excessive intrusion by public school officials into the operation of religious schools.

1. Unreasonable Search

The 4th Amendment prohibits "unreasonable searches and seizures" and provides that no warrant shall be issued "but upon probable cause, supported by oath or affirmation." The 4th Amendment's prohibitions have been made applicable to states through the Due Process Clause of the 14th Amendment.

The defendant school districts had a policy of making final approval of home schooling programs contingent upon the results of one or two scheduled on-site visits made while home instruction was in progress by representatives of the school districts or mutually acceptable third parties. There was no specific provision in the New York law requiring such on-site visits, nor was there a specified procedure through which a superintendent could obtain an administrative warrant to conduct such a visit if the parents refused to consent to the visit.

The District Court indicated that, for the purposes of the 4th Amendment, a "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. In analyzing this case, the Court first noted that, by utilizing their homes as schools, the plaintiffs did not forfeit all reasonable expectations of privacy in their homes. Thus, the Court had to determine whether conditioning an approval

of home schooling programs on such visits was an "unreasonable search" within the meaning of the 4th Amendment when there was no procedure through which a warrant authorizing such visits could be obtained from a neutral judicial officer. The Court said that, except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable," unless it has been authorized by a valid search warrant.

The Court said that, in those classes of cases in which the U.S. Supreme Court has held that an invasion of 4th Amendment privacy interests may be deemed "reasonable" without the benefit of a warrant, the public interest in permitting warrantless searches has been found to outweigh the individual privacy interests implicated by the search. The Court went on to say that three established exceptions to the warrant requirement were arguably applicable to the home school visits and concluded that one of those exceptions was applicable in this case. That exception applied to searches conducted with the consent of the party whose privacy interest is implicated.

According to the Court, the school districts pointed out that they had never conducted forceful inspections of the premises of home schoolers who refused to allow such visits. The home schoolers asserted, however, that by refusing to approve home schooling programs without first conducting an on-site inspection, the superintendents were using the powers vested in them by law to coerce the waiver of the plaintiffs' 4th Amendment rights.

In analyzing the application of the consent exception to this case, the District Court said that plaintiffs may have a right protected by the U.S. Constitution to teach their children at home, but that right is not unqualified. According to the Court, in Pierce v. Society of Sisters, 268 U.S. at 534, 45 S. Ct. at 569, the U.S. Supreme Court indicated that it would be permissible for a state to condition such a right on the ability of its officials to conduct reasonable inspections .

The District Court also noted that the on-site visits were infrequent, were limited to the area in the home in which instruction was given, and were conducted only at a mutually agreed-upon time. More importantly, the refusal of the school district to approval of a home schooling program without first conducting on-site visits did not necessarily mean that a finding of educational neglect was unavoidable. Under the compulsory attendance law, parents had the burden of demonstrating that their children were receiving an education substantially equivalent to that offered in the public schools. Obtaining the local school superintendent's approval of a home schooling program was one way to discharge that burden but not necessarily the only way. The parents still had an opportunity to convince a family court judge that their children were receiving an education meeting minimum state standards in an educational neglect proceeding. Thus, by refusing to consent to

on-site visits, parents did not necessarily forfeit their "right" to teach their children at home. The Court concluded by saying that, under these circumstances, it could not find that the ability of plaintiffs to freely and voluntarily consent to on-site inspections had been impaired.

2. Establishment of Religion

This portion of the Court's decision is described in Part A, 3, of Appendix I.

APPENDIX V

DECISION-MAKER

DECISION-MAKER

This Appendix summarizes four cases in which courts examined home school parents' claims that their rights to procedural due process, under the 14th Amendment, were violated by the role of local public school officials in approving or making decisions relating to home schools. The arguments in three of the cases were based on the concept that a conflict of interest exists when a public school district receives state funds based on the number of pupils enrolled in the school. In the remaining case, the parents argued that the local public school district was the "institutional opponent" of home schoolers. In each of the four cases summarized in this Appendix, the courts found no conflict of interest.

A. NEW YORK CASE: BLACKWELDER V. SAFNAUER

In Blackwelder v. Safnauer, 689 F. Supp. 106 (N.D.N.Y 1988) (facts summarized under Part A of Appendix I), the plaintiffs argued that by entrusting approval of their home schooling programs to local school officials, the New York law violated their procedural due process rights, under the 14th Amendment, to an impartial decision-maker. Specifically, the plaintiffs argued that, because certain school districts in New York received state funds on a per-pupil basis, local school officials had an incentive to disapprove home instruction programs so that enrollments would be increased in their districts.

The Federal District Court for the Northern District of New York said that a challenge to procedures used by state actors in reaching a decision implicating the interests of private parties requires a balancing of those private interests against the state's interest in the challenged procedure. The Court also noted that different standards would apply depending upon whether or not the official's decisions were adjudicative in nature. However, the Court said that, in this case, it was unnecessary to resolve the question of whether the superintendents performed adjudicative functions in assessing home schooling programs. According to the Court, even if it was assumed that they did perform such functions, the plaintiffs had failed to show that their interest in having their home school program assessed by an "impartial" adjudicator was threatened.

First, the Court said that school district officials involved with the evaluation of home school programs did not have a personal financial stake in the decision made.

Second, the Court said that the plaintiffs had failed to demonstrate that there was any "official motive" for New York superintendents to disapprove home instruction programs, or even a perceptible tendency for them to do so, in order to increase their school districts' funding. Specifically, the Court noted that the costs of educating a child in each

of the school districts whose superintendents were defendants exceeded the amount of state aid that those districts received for each child enrolled in their schools. Also, the Court said that even assuming that a financial incentive did exist, a school superintendent in New York is not responsible for assuring that the money necessary to run his or her school system is provided--school boards have that responsibility.

Finally, according to the Court, nothing in the record indicated that, if children attending home instruction were enrolled in public schools, the incremental increase in state aid that might result would be so great as to be considered substantial and vitally important to the fiscal well-being of the school districts.

B. NORTH DAKOTA CASES

1. State v. Anderson

In State v. Anderson, 427 N.W. 2d 316 (N.D. 1988), cert. den., __ U.S. __, 109 S. Ct. 491, the defendants appealed their convictions for violating North Dakota's compulsory attendance law. One of their contentions was that the North Dakota law authorized a financially interested decision-maker, the local school board, to determine whether a student would be excused from public school attendance. Specifically, the defendants asserted that the school district in which they resided received between $1,200 and $1,900 in foundation aid payments from the state for each student attending public school. Therefore, the local school board had a financial interest in not excusing students from the compulsory school attendance law. This, according to the defendants, violated the Due Process Clause of the 14th Amendment.

In assessing the defendants' claim, the North Dakota Supreme Court stressed that the Due Process Clause entitles a litigant to an impartial, neutral and disinterested tribunal in both civil and criminal cases. However, the Court said that if a statute is susceptible of two constructions, one of which would render it of doubtful constitutionality and one which would not, the latter construction must be adopted. In order to remove any doubt of due process infirmities under the North Dakota law, the Court construed the law to require the local school board to "monitor" whether a school-age child was attending an approved school. According to the Court, attendance at an approved private or parochial school automatically satisfied the compulsory attendance law and the local school board's act was a ministerial function rather than a discretionary, decision-making function.

2. State v. Brewer

In State v. Brewer, 444 N.W. 2d 923 (N.D. 1989), the defendants appealed their conviction for violating North Dakota's compulsory attendance law. The defendants had applied for a "physical or mental condition" exemption from the compulsory school attendance law for their daughter. A four-person multi-disciplinary team reviewed that request but did not reach a consensus on whether the daughter was entitled to the exemption. After reviewing a transcript of the meeting of the multi-disciplinary team, the local school board denied the defendant's request for an exemption. The defendants appealed to the county superintendent of schools who affirmed the school board's decision. The defendants then appealed to the State Superintendent of Public Instruction who also affirmed the decision. The defendants then applied for an "economic hardship" exemption from the compulsory school attendance law and the local school board denied that request.

In this case, the defendants argued that the local public school district was the "institutional opponent" of home schoolers. According to the defendants, local public school boards, their employes, agents and state education officials are all advocates of public education; the very nature of their positions demands a high degree of loyalty to both the form and philosophy of public schools. The defendants said that religious home schoolers reject such education and, regardless of the monetary gain or loss that each home schooler represents to a public school, public school officials have a total lack of impartiality with regard to decisions in disputes between public schools and those who wish to reject public school services.

The North Dakota Supreme Court declined to hold, as a matter of law, that the probability of actual bias on the part of public school officials approaches a constitutionally impermissible level. Also, the Court said that there was no factual evidence in the record of this case which reflected an actual bias on the part of the particular school board officials. [The Court also said that it did not believe that the "economic hardship" and "physical and mental condition" exemptions were applicable to the factual situation in State v. Brewer].

C. MICHIGAN CASE: PEOPLE V. DE JONGE

In People v. De Jonge, 179 Mich. App. 225, 449 N.W. 2d 889 (1989), the defendants appealed their convictions for violating Michigan's compulsory attendance law. They argued that the compulsory attendance law denied them the right to a neutral magistrate. The defendants claimed that their children could not be compelled to attend a public school or an approved private school until after a statutorily-required hearing established that their home school did not comply with the Michigan law.

This hearing would be held and the decision made by a public school superintendent.

The defendants contended that their due process rights were violated by the requirement that they have their "home school" approved by a superintendent of a public school system. According to the defendants, a public school superintendent has an interest in encouraging children to attend public schools because public schools receive a significant amount of state aid for each child.

The Michigan Court of Appeals rejected this argument, disagreeing with the defendants' interpretation of the purpose of the statutory hearing under Michigan law. The Court said that no approval process existed. The purpose of the hearing referred to by the defendants was to close a school. The provisions of the law relating to prosecuting parents for failure to cause their children to attend a school was a separate matter. The Court said that the hearings relating to closing a school were directed at school "administrators" and confusion arises because in a home school situation, the parents are the only school administrators.

The Michigan Court of Appeals also said that, even if there were an approval process, the defendants admitted that they did not comply with teacher certification requirements. Because the defendants admitted noncompliance, if a hearing was held, the hearing officer need not exercise discretion and the result would be the same regardless of the partiality of the magistrate.